HABITAT CONSERVATION PLANS
UNDER THE ENDANGERED SPECIES ACT

CASES ON PARTICULAR HCPS

Klamath-Siskiyou Wildlands Center et al. v. NOAA et al., Case No. 13-cv-03717 (2015 U.S. Dist. LEXIS 44872 & 2015 U.S. Dist. LEXIS 70622) (N.D. Cal. 2015) (Challenge to Fruit Growers Supply Co. Habitat Conservation Plan and Incidental Take Permits) Plaintiffs challenged a commercial timber company's HCP and 50 year permits (Fruit Growers Supply Co., FGS) covering take of Northern Spotted Owl (NSO) and Salmon on applicant's private lands intermingled with Forest Service lands. On April 3, 2015, the district court held that the ITP issued by FWS and NMFS were arbitrary and capricious. On May 29, 2015, after further briefing on remedies, the district court vacated the incidental take permits. In addition to invalidating the permits, the court held that the joint EIS prepared by the agencies under NEPA was deficient.

With regard to the FWS permit, the court held that the Service improperly relied on mitigation provided by the U.S. Forest Service in making its "maximum extent practicable" (MEP) finding under ESA section 10(a)(2)(B)(ii) in violation of the requirement that only mitigation and other conservation measures provided by the applicant may be considered in making the finding. The court held that FWS violated that section by "crediting" FGS with mitigation provided the Forest Service for the NSO. Because FWS took into account the conservation value provided by intermingled Forest Service lands in its MEP analysis, the court faulted the FWS for relying on FS lands as mitigation under the HCP. FWS awarded a higher conservation value to activity centers that included both FGS lands and adjacent Forest Service lands designated as critical habitat, concluding that those activity centers were more likely to provide long term conservation benefits to the owl. FWS did not separately analyze the value of FGS lands within conserved NSO activity centers and compare that value against the value of FGS lands within NSO activity centers open to harvest under the HCP. In other words, FWS failed to tease out and analyze the mitigation specifically provided by FGS.

The court upheld FWS's ESA section 7 biological opinion and dismissed plaintiffs' challenge to FWS's incidental take statement. The court held that both NMFS's biological opinion and permit decision were deficient in failing to analyze short term impacts to coho salmon, a long-lived species.

The court held that the EIS prepared by the Services was deficient in its analysis of cumulative impacts and in failing to address adequately herbicide use (not a covered activity under the permits) and water withdrawals. The court, following Lands Council v Powell, 395 F.3d 1019 (9th Cir. 2005), held that the agencies failed to adequately identify and analyze the impacts of all past, present, and reasonably foreseeable timber harvest projects in the action area.

Union Neighbors United, Inc. v. Jewell, 2016 U.S. App. LEXIS 14377 (D.C. Cir, August 5, 2016) (challenge to HCP & NEPA) Plaintiff challenged an HCP/ITP (and NEPA) for the Buckeye Wind Power Project in Ohio for take of endangered Indiana bats. Specifically, Plaintiff

challenged MEP, arguing that FWS should have required more mitigation, and that FWS violated NEPA by not analyzing "an economically feasible alternative that would take fewer bats than Buckeye's proposal"; the Court ruled for Plaintiff on NEPA, but for FWS on remaining claims.

On NEPA, FWS considered four alternatives: (1) Applicant's proposed action of 6.0 m/s at night from April to October (which would take 5.2 bats/year); (2) a Max Alternative of shutting down turbines from sunrise to sunset when bats are active, and would eliminate take of any bats; (3) a Minimal alternative to reduce a cut-in speed of 5.0 m/s during the fall migration period during hours when bats most active (resulting in take of 12 bats/year and over 300 over life of the project), and (4) no action alternative. During the public comment of the EIS, Plaintiff requested FWS to consider a cut-in speed of 6.5 m/s as another alternative. FWS argued that 6.5 m/s was a one of an "infinite combination of cut-in speeds higher than the proposed action" and "because the difference between Buckeye's proposal and the Max Alternative was 'not significant,' making analysis of other variations with higher cut-in speeds [was] 'not necessary.'" The Court disagreed, citing that when FWS rejected Plaintiff's comment, "it did not say that higher cut-in speeds were 'effectively incorporated' or had been 'previously considered' in its analysis," rather rejected as "not necessary." Because FWS "failed to consider any economically feasible alternative that would take fewer Indiana bats than Buckeye's proposal, it failed to consider a reasonable range of alternatives," and violated NEPA.

The Circuit Court gave Skidmore deference to the 1996 handbook, rejecting FWS request to apply Chevron (unlike the district court, which appeared to give Chevron deference). The Court still gave deference "that the term 'impacts' refers to the population or subpopulation of the species as a whole, rather than the discrete number of individual members of the species," rejecting Plaintiff argument to minimize impacts to individuals. On MEP, the Court again gave deference to the handbook that once the applicant fully offsets the take, there is no need for additional measures by the applicant (even if applicant could practicably do more).

Plaintiff also challenged FWS' independent determination (per Gerber), but the court declined to opine whether FWS independently analyzed as impracticable Plaintiff's comment for 6.5 m/s cut-in speed.

Friends of the Wild Swan v. Jewell, 2014 U.S. Dist. LEXIS 116788 (D. Mont., Aug. 21, 2014) (challenge to Montana DNR HCP) Plaintiffs challenged an HCP covering take of grizzly bears and bull trout on state trust lands. The court ruled that FWS reasonably concluded that the plan mitigated for take of bull trout to the maximum extent practicable, but the court reached the opposite conclusion with respect to take of grizzly bears. As to grizzly bears, the HCP allowed the state to cease managing a large tract of "secure core" habitat, and replaced this area with seasonal management restrictions. The court faulted FWS's conclusion that take of bears would be fully mitigated, finding that there was "limited scientific support" for that conclusion. Citing the HCP Handbook guidance that, where adequacy of mitigation is a "close call," the record must support a finding that the mitigation is the maximum practicable, the court found that FWS made no independent analysis of whether more mitigation was impracticable. The court faulted FWS for relying entirely on DNR's representations as to practicability.

The court did, however, uphold FWS's no-jeopardy conclusion as to bull trout in the biop on the HCP. And the court held that the EIS on the HCP analyzed a reasonable range of alternatives, where it considered 3 action alternatives. Finally, the court held that the EIS adequately considered cumulative impacts of climate change.

Wildearth Guardians v. USFWS, 622 F. Supp. 2d 1155 (D. Utah 2009) (Challenge to the Cedar City, Utah HCP). The court upheld an incidental take permit that FWS issued to the City of Cedar City and the Paiute Indian Tribe to live trap and relocate Utah prairie dogs that were damaging lands managed by both entities. The court ruled that the FWS was not required to include a precise numeric take limit in the permits, as the court noted that: population counts are generally unreliable; the intent was to relocate the entire population, so a "including a specific take limit would have added a complication and unnecessary restriction should the site population exceed the take limit"; and an estimate in the ITS was reasonable. The court also found the HCP adequately minimized and mitigated the impacts of the take to the maximum extent practicable, finding that the FWS did consider alternative minimization measures for the prairie dogs (buried fences). The Court also ruled that the FWS did not make "a clear error of judgment" in approving the mitigation area where translocated prairie dogs would be relocated, where the mitigation area was protected by a conservation easement, the mitigation area already contained habitat for the species, and the HCP documents required the permittees and other entities to ensure vegetation in the area would be appropriate for the prairie dogs in the future.

SWCBD v. Bartel, 470 F. Supp. 2d 1118 (S.D. Cal. 2006) (inclusion of vernal pool species in City of San Diego MSCP). The court ruled against the FWS in this challenge to the permit the FWS issued to the City of San Diego. Plaintiffs challenges the assurances with respect to seven covered vernal pool species. The permit did not authorize take of vernal pool species within jurisdictional waters of the U.S. – take authorization was to be provided instead through future section 7 consultations between the Army Corps of Engineers and the FWS on Clean Water Act Section 404 permits – but the HCP did provide assurances as to the level of mitigation the FWS would require in these future section 7 consultations. However, the U.S. Supreme Court's subsequent ruling in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC), called into question whether vernal pools are waters of the U.S. subject to Corps jurisdiction and thus whether the future section 7 consultations contemplated by the HCP would ever take place. Developers intervened to argue that the permit now authorized take of vernal pool species wherever found.

The court held that the FWS's "maximum extent practicable" determination was arbitrary and capricious for the vernal pool species because the absence of a Clean Water Act Section 404 federal nexus allowing projects affecting vernal pools to be reviewed under Section 7 of the ESA. The court also held that the City did not provide adequate funding assurances as required under Section 10(a)(2)(B)(iii), and that the FWS's Section 10(a)(2)(B)(iv) and Section 7 biological opinion no-jeopardy determinations were defective. The determinations did not adequately examine the impacts of the ITP on vernal pool species, because the FWS had assumed there would be no impacts pending future Section 7 evaluation of individual projects and because the FWS did not examine the impacts of take of vernal pool species in areas outside Corps of Engineers jurisdiction even though the plan contemplated the loss of up to 12% of vernal pool habitat.

Finally, the court held that the mitigation assurances in the IA violate the ESA because 1) they locked in mitigation requirements while deferring until later any evaluation of impacts on vernal pool species; 2) rely on mitigation measures the FWS had previously concluded were "ineffective, experimental, and inadequate," and 3) are inconsistent with the ESA requirement that habitat conservation plans "conserve" vernal pool species.

The court enjoined the ITP as applied to the seven vernal pool species and ordered the FWS to reinitiate consultation to determine whether the plan and ITP should be modified or terminated as applied to the seven vernal pool species. The court held that the remainder of the regional MSCP plan is sound and provides a benefit to the other 78 species it covers. The court also held that the FWS had provided an independent, rational explanation for not insisting on the biologically preferred alternative in making its Section 10(a)(2)(B)(ii) findings and that the City had prepared the Management Framework Plan required under the ITP. The court rejected the developers' argument that the permit authorized take of vernal pool species wherever they might be found.

In April 2011, after the City had relinquished the portions of its permit that applied to the vernal pool species and the FWS cancelled the same portions of the permit, the district court vacated its injunction.

Environmental Protection Information Center (EPIC) v. U.S. Fish & Wildlife Service, 2005 U.S. Dist. LEXIS 7200 (N.D. Cal. 2005) and 2005 U.S. Dist. LEXIS 30843 (N.D. Cal. 2005) (Pacific Lumber Co. HCP). EPIC sued the FWS and others with regard to the incidental take permits issued to Pacific Lumber in 1999. EPIC asserted that the activities authorized by the ITPs must be reexamined, because new information indicated impacts to the covered species were far greater than anticipated when the permits were issued. EPIC requested, among other things, that the FWS be ordered to reinitiate consultation under Section 7, stop authorizing activities likely to violate Section 7(d), and stop authorizing any take of the northern spotted owl.

The court ruled in the FWS's favor. Among other things, EPIC claimed that FWS should not have issued the permit, because California prohibits the taking of birds of prey, including spotted owls, and Pacific Lumber's activities therefore were not "otherwise lawful" under state law. The court ruled that EPIC's argument had some literal appeal, but made no sense:

> Congress could not have intended that the Fish and Wildlife Service investigate all possible state and local laws that could be potentially violated by a private entity's activities before the Service issue an incidental take permit. The Service merely exempted Pacific Lumber from the Endangered Species Act. If Pacific Lumber's activities also violate California law, California may enforce its laws against Pacific Lumber.

The court ruled that ongoing activities such as the adaptive management plan in the HCP and the revised biological opinion did not require a supplemental EIS. The court also ruled that evidence suggesting the permittee had violated the permit's terms and conditions did not require FWS to revoke the permit, because FWS is best-placed to determine whether violations had occurred and is vested with law enforcement discretion in doing so. Finally, with respect to the biological opinion, the court concluded that FWS had, among other things, sufficiently supported its

conclusions regarding the effects of oil spills, justified its methodology regarding populations declines, and addressed new information regarding additional occupied habitat.

Gerber and Defenders of Wildlife v. Norton, 294 F.3d 173 (D.C. Cir. 2002). A developer proposed an HCP for construction of a subdivision in Delmarva fox squirrel habitat. The HCP included offsite mitigation. The draft HCP circulated for public comment described the characteristics of the offsite mitigation parcel, but did not specify its location. The notice also stated that further information on the offsite mitigation parcel was available in FWS=s field office. However, the draft HCP provided to plaintiffs and other members of the public did not contain a copy of the map. In addition, FWS considered an alternative development configuration what would have reduced the likelihood that fox squirrels would be taken and requested that the developer implement this alternative. The developer rejected the alternative because it would be too expensive and would delay the local zoning approval process. FWS therefore issued the permit without requiring implementation of the alternative development configuration.

Defenders sued, alleging, among other things, that FWS had violated the ESA and the APA by failing to provide the map during the comment period and by adopting the developer=s view as to the practicability of the alternative development configuration instead of making its own finding. The district court ruled for FWS, concluding that even if FWS should have made the map available during the comment period, the error was harmless, and that the Service had found that the alternative configuration was impracticable. The D.C. Circuit reversed, holding that FWS=s failure to include the offsite mitigation parcel map as part of the draft HCP circulated at the beginning of the comment period violated both its ESA section 10(c) duty to make the complete permit application available to the public and its section 10(a) duty to provide a meaningful opportunity for comment. The court also held that FWS may not simply accept an applicant=s assertion that a lesser-impact alternative is impracticable, but must determine independently whether an incidental take permit applicant will minimize and mitigate the impacts of take to the maximum extent practicable.

On remand, FWS analyzed the practicability of rearranging the access road and lots, which would have entailed extended and likely unsuccessful local growth limitation variances, and distributed a copy of the offsite map. Only the plaintiffs submitted comments. FWS=s decision was to continue the permit in force. FWS submitted a notice to the Court of completion of remand in September 2003, and the permit has not been challenged since then.

California Native Plant Society v. Babbitt (S.D. Cal.) (challenge to the inclusion of the Otay tarplant as a covered species in the ITPs issued to the City and County of San Diego for the MSCP). Plaintiffs claimed FWS violated Section 7 by failing to consult on a conservation agreement with a landowner in the City of Chula Vista that set forth conservation levels for the Otay tarplant. Chula Vista did not have an approved MSCP subarea plan at the time the suit was filed and the conservation agreement hinged on the future approval of such subarea plan. Plaintiffs challenged the no jeopardy opinions issued with respect to coverage of the tarplant in the City and County of San Diego's ITPs, and argued that FWS violated Section 7 by failing to initiate consultation on a mitigation bank agreement with San Miguel Ranch, the landowner with the

largest tarplant population.

This case was settled. The developer committed to provide additional mitigation lands to be transferred to the Service to be owned and managed as part of the San Diego NWR. In return, the Service approved a partial transfer of the County of San Diego's ITP to the City of Chula Vista to enable the developer to proceed with its project in advance of approval of the City's HCP.

National Wildlife Federation v. Babbitt, 128 F.Supp.2d 1274 (E.D. Cal. 2000) (Natomas Basin HCP). Plaintiffs raised a number of claims against the Natomas Basin HCP, including that the FWS's finding that the plan would mitigate impacts to covered species to maximum extent practicable was arbitrary and capricious, and that the FWS's finding that funding for the plan was assured was arbitrary and capricious. Plaintiffs also included two NEPA-based challenges -- failure to prepare an EIS on a 53,000 acre regional plan and failure to include a reasonable range of alternatives.

The court held that while the Natomas Basin HCP was, except for the level of mitigation, adequate as a *regional* plan, it was not adequate as applied to the City alone. The court held that the FWS had not fulfilled its duty to determine that the plan would mitigate impacts to covered species to maximum extent practicable where the mitigation fees were set "at the minimum amount necessary to meet the minimum biological necessities of the covered species," and where the record was "devoid" of evidence that the FWS conducted its own examination of the practicability of the proposed fee base or "attempted to determine if a higher fee base would also be practicable." 128 F. Supp. 2d at 1292-1293. The court also held that the City had not ensured adequate funding, as required by ESA section 10(a)(2)(B)(iii), because the City had not guaranteed that adequate funding would be available, but instead relied on funds to be provided by subsequent participants. The court stated that while it was not clear that a funding mechanism not backed by the applicant's guarantee would *ever* meet the "ensure" funding requirement, "where the adequacy of funding depends on whether third parties decide to participate in the Plan, the statute requires the applicant's guarantee." 128 F. Supp. 2d at 1295. The court also held that FWS's FONSI was arbitrary and capricious because of substantial uncertainty as to the HCP's effects. The court contrasted the situation in Friends of Endangered Species v. Jantzen, where the court found that the mitigation measures appeared "to completely compensate for any possible adverse environmental impacts." The court also contrasted the ESA and NEPA approaches to uncertainty, stating that while the uncertain success of mitigation measures does not prevent issuing a permit, "NEPA's approach to such uncertainty is to require an EIS." 128 F. Supp. 2d at 1301-1302.

National Wildlife Federation v. Norton, 306 F.Supp.2d 920 (E.D. Cal. 2004) (Metro Air Park HCP). Metro Air Park (MAP) is a 2000 acre commerical and residential development project located in the Natomas Basin within the unicorporated portion of Sacramento County. Because the County does not participate in the regional Natomas Basin HCP, the MAP Property Owners Association filed an individual HCP and permit application. The MAP HCP is designed to be compatible with the regional HCP and addresses the deficiencies identified in the 2000 district court decision on the original Natomas Basin HCP. Plaintiffs challenged FWS=s findings on mitigation, funding, and jeopardy.

Judge Levi, the same judge who invalidated the original Natomas Basin HCP, ruled in favor of the Service, holding that FWS's no-jeopardy determinations did not violate sections 10 and 7 by failing to identify specific mitigation lands, because the HCP and ITP included detailed acquisition and management criteria to ensure the mitigation lands would provide Asuperior@ habitat for the covered species. The court held funding was adequately assured through (1) covenant restrictions applicable to all MAP property owners, and (2) IA provisions that require the permittee to commit additional funding if mitigation fees are inadequate to fully implement the plan, require that all mitigation be in place before the last 10 percent of buildout, and provide for midpoint review of the plan. Finally, he upheld FWS's finding under Section 10(a)(2)(B)(ii) that the plan minimizes and mitigates the impacts of take to the maximum extent practicable (MEP). He accepted as reasonable FWS's interpretation of the statutory requirement as meaning the level of mitigation provided must be "rationally related to the level of take under the plan" and accorded that interpretation deference under the Chevron v. NRDC standard discussed above under "Judicial Review." And he held that, once FWS had determined that the mitigation provided "more than compensates" for the impacts of take, it did not need to demonstrate that more mitigation would be infeasible, although he noted that the record supported FWS's conclusion that higher mitigation ratios would be impracticable. Plaintiffs did not appeal.

***National Wildlife Fed'n v. Babbitt (Natomas II)*, 2005 U.S. Dist. Lexis 33768 (E.D. Cal. 2005) (Natomas Basin HCP).** Following *Natomas I*, FWS issued a new permit, this time, to the City of Sacramento and Sutter County. Plaintiffs challenged the FWS permit findings on jeopardy to the affected species, adequacy of mitigation, and adequacy of funding. This time, based on the strength of the administrative record, FWS's explanations for tis findings, and the court's reasoning in the Metro Air Park HCP case, the court affirmed FWS's decision-making. Of note is that the court considered the permitted package as whole and cited the clarity and consistency of the FWS findings document, EIS, biological opinion, and HCP.

The court upheld the FWS's no-jeopardy finding, because the court concluded the FWS had considered the relevant factors and had articulated a rational connection between the evidence in the administrative record and the conclusions it reached. The FWS addressed the non-participation of other agencies, considered the potential Joint Vision development plan, and did not depend on the 800-foot preferred setbacks in reaching the no-jeopardy conclusion. The court clarified the mitigation standard it had outlined in the Metro Air Park HCP case, noting that there are two components to the mitigation finding – (1) the adequacy of the mitigation program in proportion to the level of take that will result, and (2) whether the mitigation is the maximum that can be practically implemented by the applicant – and that a stronger showing on one factor may compensate for a weaker showing on the other. The court found the mitigation to be adequate, because the record showed the FWS had considered relevant biological factors, including the type and extent of habitat to be affected, the availability of temporary foraging areas, and the proximity of acquired reserves to nesting trees. Although plaintiffs presented an expert who held contrary views, the court held that FWS had explained its opposing position and had considered and responded to the expert's comments.

Plaintiffs asserted that additional mitigation would be "practicable," unless it would be totally infeasible, but the court held that "practicable" as used in the ESA does not simply mean "possible," but means "reasonably capable of being accomplished." The economic analysis noted a number of uncertainties that could make the higher mitigation fees infeasible. In light of these uncertainties and the rapid rise in fees noted in the FWS permit findings, the court held that the FWS had justifiably concluded that additional mitigation was not "reasonably capable of being accomplished" without jeopardizing the proposed development. The court concluded that mitigation adequacy is not simply a matter of arithmetic based on firm figures and projections, but a judgment call based on the uncertainties of the real estate market and other factors that affect development costs and rewards. The court noted that the City and Sutter provided an expert analysis to substantiate the conclusion that additional mitigation was not practicable, and more importantly, that the FWS provided an independent analysis that corroborated and went beyond the information provided by the City and Sutter.

Finally, the court found that adequate funding had been assured. The court found that the HCP included several provisions to protect against rising land costs during the period between collection of fees and acquisition of reserve lands. For instance, it required a 200-acre "cushion" of reserve lands, so that development will not outpace the acquisition of mitigation land. Also, the court noted that the City and Sutter would be able to adjust the mitigation fees and that "catch-up" fee ordinances would further protect against rising land costs by narrowing the window between fee payment and acquisition of mitigation land. Finally, mitigation fees were not capped, so that fees could be increased to compensate for rising land costs.

Canyons Network v. Norton (S.D. Cal.) (Fieldstone/LaCosta HCP and ITP in Carlsbad, California). The HCP covers about 2000 acres within an important linkage area for gnatcatchers. It also contains a significant portion of the remaining habitat of the Del Mar manzanita, a listed plant species. The landowner went bankrupt shortly after the permit issued. The new owners did not restart development plans until several years later, and plaintiffs filed their lawsuit only five days before the six-year statute of limitations period would have run. Plaintiffs challenged the Service's mitigation, funding, and jeopardy findings and also argued that FWS should have prepared an EIS rather than an EA, and that the EA failed to discuss a reasonable range of alternatives. We settled this case in early March 2002 on terms that require the permittee to provide additional mitigation, but impose no additional obligations on the Service.

Loggerhead Turtle v. County of Volusia, Florida, 120 F.Supp.2d 1005 (M.D. Fla. 2000) (incidental take permit with respect to beach activities that affect turtles). Plaintiffs challenged an incidental take permit covering take associated with a county=s comprehensive plan for managing vehicular access to its beaches. Plaintiffs contended that the HCP did not minimize and mitigate the impacts of the taking to maximum extent practicable and that the funding was inadequate. They also asserted that FWS should have revoked the permit because of various alleged violations of the permit since it was issued and that FWS should have reinitiated consultation on the permit because of the alleged permit violations and other new evidence.

The court ruled for FWS on all issues, concluding that the administrative record provided a

rational basis for FWS's findings. The court noted that FWS had the discretion to rely on the reasonable opinions of its own biologists, even if plaintiffs' experts presented opposing views. The court also found that FWS's decisions as to whether to revoke the permit are discretionary and entitled to deference, and that reinitiation of consultation was not required, particularly since the permit's term was only 5 years.

Sierra Club v. Babbitt, 15 F.Supp.2d 1274 (S.D. Ala. 1998) (Alabama beach mouse). Plaintiffs challenged two permits issued by FWS that allowed incidental take of the Alabama beach mouse resulting from development on Fort Morgan Peninsula, Alabama. The HCPs provided that offsite property would be acquired and protected to mitigate for unavoidable impacts in the project area. Plaintiffs argued that the level of mitigation was inadequate and that there was no basis in the administrative record for determining that the mitigation met the maximum extent practicable standard. Plaintiffs also argued that FWS was applying inconsistent mitigation requirements to different projects affecting the beach mouse in the same area and that FWS had unjustifiably relied on unnamed sources to provide funds to make up for the inadequacy in offsite mitigation. Finally plaintiffs contended FWS should have prepared an EIS on the projects.

The court ruled that FWS had never explained or provided any analysis as to whether the amount of offsite mitigation met the Amaximum extent practicable@ standard. The court held that the record had to contain some analysis of why the level of mitigation was appropriate and that FWS could not without explanation apply inconsistent mitigation policies for the beach mouse. The court also held that FWS relied on the availability of outside funding for mitigation without discussing how much funding would be available and who would provide it. The court found under NEPA that FWS=s Finding of No Significant Impact (FONSI) was not justified, because of the lack of reliable current population data, lack of data on distribution of the ABM within its range, and lack of an estimate of the minimum viable population size.

Sierra Club v. Norton, 207 F.Supp.2d 1310 (S.D. Ala. 2002) (Alabama beach mouse). Sierra Club and Friends of the Earth challenged incidental take permits the Service issued for two developments on Fort Morgan Peninsula, Alabama that would result in take of the endangered Alabama beach mouse (ABM) and destruction of some of its habitat. The Service determined that preparation of an EIS was not warranted because the project impacts would be insignificant. Sierra Club previously challenged two other incidental take permits for developments on Fort Morgan Peninsula. The court issued a preliminary injunction against the permits, after concluding that FWS had not justified its decision not to prepare an EIS. The court held that FWS=s Finding of No Significant Impact (FONSI) was arbitrary and capricious because it was implausible for FWS to have concluded that a loss of 20 percent of optimal habitat in the action area on top of previous losses of over 20 percent of optimal habitat would be insignificant. The court held that FWS had failed to explain how such a Asubstantial cumulative loss of habitat would not have a significant impact on the ABM.@ The court also found that FWS lacked necessary information on minimum habitat requirements, the potential effects of the loss of optimal habitat, and the potential effects of the loss of a substantial portion of escarpment on the terrain and the species.

Center for Biological Diversity v. Fish and Wildlife Service, 202 F.Supp.2d 594 (W.D. Tex. 2002) (La Cantera HCP). This HCP covers a planned 750-acre shopping center development in Texas that will take three karst invertebrate species. The developer mitigated the impacts of the taking by purchasing and preserving an offsite 179-acre tract containing karst invertebrates, at a cost of $4 million. Plaintiff argued that the HCP failed to minimize and mitigate the impacts of the taking to the maximum extent practicable and failed to ensure the project would not result in jeopardy to the species. Plaintiff also argued that FWS should have prepared an EIS instead of an EA. In a lengthy and entertaining decision, the court ruled for FWS on all issues.

San Bruno Mountain Watch v. U.S. Fish and Wildlife Service (N.D. Cal.) (San Bruno Mountain HCP). Plaintiff alleged that the FWS violated section 7 of the ESA in failing to reinitiate consultation on the ITP following the listing as endangered of the callippe silverspot butterfly and in response to new information about the San Bruno Mountain HCP's impacts on the Mission blue and San Bruno elfin butterflies. Plaintiff alleged the plan is resulting in jeopardy to all three species. FWS settled the first claim by agreeing to initiate consultation regarding the plan's impacts on the callippe. FWS concluded through informal consultation that the permit would not adversely impact the callippe, based on letters from the permittees stating that they would not authorize any development within callippe silverspot habitat. On January 6, 2003, the court entered a consent decree and final judgment. The consent decree requires reinitiation of consultations on the impacts of the San Bruno Mountain incidental take permit on the three butterfly species, preparation of quarterly status reports to be provided to the plaintiff, and payment of attorneys' fees. Plaintiff dismissed its claims without prejudice.

Court of Federal Claims Cases

Taylor v. U.S. (Court of Federal Claims, 2001). A developer applied for a permit to build on a lot located near an active bald eagle nest, but refused to implement any minimization and mitigation measures. The FWS made offsite mitigation suggestions, but the developer did not accept them, and sued the government, seeking compensation for a Fifth Amendment taking. The FWS argued that a house could be built while preserving a forest buffer, and prepared an HCP and issued a permit for that alternative configuration, but the developer did not accept this permit. The FWS never formally denied the initial permit application during the three years after the application was submitted. The court was concerned by the FWS' apparent unwillingness to process the application. After the court indicated at a hearing that it would not find a permanent taking, but that the delay since the filing of the application might be a temporary taking, the parties settled the case.

GDF Realty v. Norton (D. Tex. And Court of Federal Claims, 1999-2009). GDF Realty filed several different incidental take permit applications for different portions of its property. The FWS recommended revisions to make the applications acceptable, but GDF refused to revise its applications. When the FWS responded that it was willing to continue processing the applications, GDF sued, asking the court to declare that the applications had been denied. The court ruled in June 1999 that FWS had *de facto* denied the applications, because 1) the FWS stated that it would not be able to approve the applications without revisions, and 2) GDF's attorney

stated that GDF was not willing to revise the applications.

GDF then filed a Claims Court suit alleging that the permit denial "took" its property without compensation in violation of the Fifth Amendment. The FWS identified an alternative development configuration the FWS believed would meet the incidental take permit issuance criteria. GDF rejected this alternative, but the FWS published a Federal Register notice stating the FWS was prepared to issue a permit allowing GDF to develop according to the alternative development configuration. The proposed permit was evidence that the ESA was not preventing GDF from developing its property and that GDF therefore was not entitled to compensation.

GDF filed for bankruptcy in early 2001 and lost a significant portion of its property in foreclosure in 2002. Negotiations on the remaining property led in 2008 to the FWS issuing an incidental take permit that covers 70 acres and to the purchase, with partial FWS funding, of the most environmentally sensitive portion of the property (about 20 acres) for inclusion in the Balcones Canyonlands Preserve, which operates under an existing city/county HCP. The parties subsequently agreed to settle the remaining issues in the case, including all claims for the Fifth Amendment takins, and the court dismissed the case in September 2009, ending over ten years of litigation over the development and conservation of the property.

Doyle v. U.S. (129 Fed. Cl. 147, 2016, Washington County UT HCP, Mojave desert tortoise) Plaintiffs Doyle, a real estate developer claimed a Fifth Amendment taking for taking his property, or that the government breached a contract to acquire up to 2,440 acres of his property at the time of the alleged taking. The Court found no breach of contract claim as Plaintiffs were not parties to the HCP (just UT and Town Ivins and Washington County) and IA stated "no third party beneficiaries." Also , the Court dismissed Plaintiffs' claims as unripe as the Plaintiff failed to apply for an HCP/ITP.